

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 05, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BECKY R.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 4:17-CV-05153-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 13, 17. Attorney D. James Tree represents Becky R. (Plaintiff); Special Assistant United States Attorney Martha A. Boden represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

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Plaintiff filed an application for Disability Insurance Benefits on May 7, 2013, Tr. 203, alleging disability since October 1, 2004, Tr. 193, due to bipolar disorder, attention deficit hyperactivity disorder, narcolepsy, arthritis, foot injury/problem, and back injury/pain. Tr. 206. The application was denied initially and upon reconsideration. Tr. 81-87, 89-93. Administrative Law Judge (ALJ) Mary Gallagher Dilley held a hearings on July 7, 2015¹ and May 4, 2016 and heard testimony from Plaintiff, medical expert Peter Schosheim, M.D., and vocational expert, Paul Prachyl, Ph.D.² Tr. 39-65. At the May 4, 2016 hearing, Plaintiff amended her onset date to September 1, 2010, “for procedural ease.” Tr. 42. The ALJ issued an unfavorable decision on June 27, 2016. Tr. 20-33. The Appeals Council denied review on July 24, 2017. Tr. 1-6. The ALJ’s June 27, 2016 decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on September 27, 2017. ECF Nos. 1, 4 .

STATEMENT OF FACTS

The facts of the case are set forth in the administrative hearing transcript, the ALJ's decision, and the briefs of the parties. They are only briefly summarized here.

Plaintiff was 47 years old at the amended date of onset. Tr. 193. At application, she reported that she completed the eleventh grade in 1979. Tr. 207. She reported her work history as a product demonstrator at Costco. *Id.* Plaintiff reported that she stopped working in 2003 due to her conditions. *Id.*

¹The hearing transcript from the July 7, 2015 hearing is absent from the record.

²The record also shows that a hearing was scheduled for January 7, 2016, Tr. 137-61, but there is no evidence this hearing was held.

1 Plaintiff maintained ensured status for Disability Insurance Benefits through
2 September 30, 2010. Tr. 195. Therefore, she must establish disability on or before
3 September 30, 2010 to be eligible for benefits under Title II of the Social Security
4 Act. *See* 20 C.F.R. § 404.315(a)(1).

5 **STANDARD OF REVIEW**

6 The ALJ is responsible for determining credibility, resolving conflicts in
7 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
8 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
9 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
10 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
11 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
12 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
13 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
14 another way, substantial evidence is such relevant evidence as a reasonable mind
15 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
16 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
17 interpretation, the court may not substitute its judgment for that of the ALJ.
18 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
19 findings, or if conflicting evidence supports a finding of either disability or non-
20 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
21 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
22 evidence will be set aside if the proper legal standards were not applied in
23 weighing the evidence and making the decision. *Browner v. Secretary of Health*
24 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

25 **SEQUENTIAL EVALUATION PROCESS**

26 The Commissioner has established a five-step sequential evaluation process
27 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); *see Bowen*
28 *v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of

1 proof rests upon the claimant to establish a prima facie case of entitlement to
2 disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once the
3 claimant establishes that physical or mental impairments prevent her from
4 engaging in her previous occupations. 20 C.F.R. § 404.1520(a)(4). If the claimant
5 cannot do her past relevant work, the ALJ proceeds to step five, and the burden
6 shifts to the Commissioner to show that (1) the claimant can make an adjustment to
7 other work, and (2) specific jobs which the claimant can perform exist in the
8 national economy. *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94
9 (9th Cir. 2004). If the claimant cannot make an adjustment to other work in the
10 national economy, a finding of “disabled” is made. 20 C.F.R. § 404.1520(a)(4)(v).

11 **ADMINISTRATIVE DECISION**

12 On June 27, 2016, the ALJ issued a decision finding Plaintiff was not
13 disabled as defined in the Social Security Act.

14 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
15 from September 1, 2010, her amended date of onset, through September 30, 2010,
16 her date last insured. Tr. 22.

17 At step two, the ALJ determined Plaintiff had the following severe
18 impairments through the date last insured: left ankle degenerative joint disease
19 status post-surgery; depression; and anxiety disorder. Tr. 22.

20 At step three, the ALJ found Plaintiff did not have an impairment or
21 combination of impairments that met or medically equaled the severity of one of
22 the listed impairments through the date last insured. Tr. 24.

23 At step four, the ALJ assessed Plaintiff’s residual function capacity through
24 the date last insured:

25
26 the claimant had the residual functional capacity to lift and carry 20
27 pounds occasionally and 10 pounds frequently. She could stand and/or
28 walk for about two hours and sit for six hours in an eight-hour day with
normal breaks. The claimant was limited to pushing and pulling 20

1 pounds occasionally and 10 pounds frequently. She could never crawl
2 or climb ladders, ropes or scaffolds, but could occasionally climb ramps
3 and stairs. The claimant could never balance on the left foot, but could
4 frequently balance on the right foot. She could frequently kneel. The
5 claimant could occasionally crouch and stoop. She needed to avoid all
6 exposure to temperature extremes of cold and heat and hazards such as
moving machinery and heights. The claimant could perform simple,
routine tasks.

7 Tr. 26. The ALJ identified Plaintiff's past relevant work as demonstrator and
8 concluded that Plaintiff was not able to perform this past relevant work. Tr. 31.

9 At step five, the ALJ determined that, considering Plaintiff's age, education,
10 work experience and residual functional capacity, and based on the testimony of
11 the vocational expert, there were other jobs that exist in significant numbers in the
12 national economy Plaintiff could perform through the date last insured, including
13 the jobs of dies loader, final assembler, and patcher. Tr. 32. The ALJ concluded
14 Plaintiff was not under a disability within the meaning of the Social Security Act at
15 any time from September 1, 2010, through the date last insured, September 30,
16 2010. Tr. 33.

17 ISSUES

18 This is a difficult case in which Plaintiff is required to establish disability
19 almost three years prior to her filing date to be eligible for benefits. The record
20 provides limited insight into her impairments prior to the September 30, 2010 date
21 last insured. The majority of the evidence appears to address her decision to
22 donate a kidney to her child and her treatment for acute osteoarthritis in her left
23 foot.

24 The parties' arguments, addressed further below, focus on what impairments
25 the evidence established prior to the September 30, 2010 date last insured.
26 However, there appears to be missing records from multiple providers that could
27 provide additional insight into Plaintiff's impairments and functional abilities in
28 September of 2010. The record shows that several providers were referring her to

1 specialists and that these specialists were reporting back to these providers, yet the
2 records from the referring providers are absent. In 2009, Plaintiff's primary care
3 provider was listed as Emmanuel Edibiopko, M.D., Tr. 261-62, 265, 272, 490,
4 along with Darian J. VanGorkum, DPM, Tr. 262, 265. Earlier, in 2006, Dr. Cote
5 was listed as her primary care provider. Tr. 460, 465, 468. There is no evidence
6 from these providers throughout the record. Additionally, at application, Plaintiff
7 stated that she had received treatment from Badger Mountain Family Medicine
8 from 2010 to 2013, Dr. Peacock at Columbia Rheumatology in 2012 to 2013, and
9 KGH Physicians Clinic. Tr. 210-13. No evidence from these locations appear in
10 the record. It does appear that some of these records were requested upon initial
11 evaluation of the claim, but it is unclear what response the Commissioner received.
12 Tr. 68-69 (showing records were requested from Columbia Rheumatology and
13 Badger Mountain Family Medicine). At the May 4, 2016 hearing, the ALJ referred
14 to the July 2015 hearing, stating "[t]here are outstanding medical records and we
15 weren't able to proceed." Tr. 41.

16 This highlights a separate difficulty in this case: an incomplete record
17 before this Court. First, there is evidence of three separate hearings being
18 scheduled in this case: (1) July 7, 2015, Tr. 106; (2) January 7, 2016, Tr. 137-61;
19 and (3) May 4, 2016, Tr. 162. Yet, the ALJ states that only the July 7, 2015 and
20 the May 4, 2016 hearings were held. Tr. 20. More frustrating for the Court, only
21 the May 4, 2016 hearing transcript is in the record. Tr. 39-65. Therefore, without
22 the transcript of the July 7, 2015 hearing, there is no way of knowing what
23 evidence the ALJ had intended to gather.

24 The questions presented by Plaintiff appears to overlook the missing medical
25 records and the missing hearing transcripts. Plaintiff contends the ALJ erred by (1)
26 failing to find her bilateral hand arthritis severe at step two, (2) failing to properly
27 weigh the medical opinions of her treating providers, and (3) failing to properly
28 address her symptoms statements. However, the Court finds overcoming the lack

1 of evidence and incomplete record as a major challenge in addressing Plaintiff's
2 arguments.

3 **DISCUSSION³**

4 **1. Step Two**

5 Plaintiff argues that the ALJ erred in failing to find the arthritis in both
6 hands as a severe impairment. ECF No. 13 at 6-13.

7 The step-two analysis is “a de minimis screening device used to dispose of
8 groundless claims.” *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). An
9 impairment is “not severe” if it does not “significantly limit” the ability to conduct
10 “basic work activities.” 20 C.F.R. § 404.1522(a). Basic work activities are
11 “abilities and aptitudes necessary to do most jobs.” 20 C.F.R. § 404.1522(b). “An
12 impairment or combination of impairments can be found not severe only if the
13 evidence establishes a slight abnormality that has no more than a minimal effect on
14 an individual’s ability to work.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir.
15 1996) (internal quotation marks omitted). A medically determinable impairment
16 must be established with objective medical evidence; a claimant’s statements alone
17 will not suffice. *See* 20 C.F.R. § 404.1521.

18 The ALJ found that current evidence showed the existence of bilateral hand
19 arthritis, but that the impairment was not medically determinable on or before the
20 date last insured. Tr. 24. In doing so, the ALJ addressed three specific citations to
21

22 ³In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held
23 that ALJs of the Securities and Exchange Commission are “Officers of the United
24 States” and thus subject to the Appointments Clause. To the extent *Lucia* applies
25 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in
26 their briefing. *See Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161
27 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not
28 specifically addressed in an appellant’s opening brief).

1 the record: (1) A January 18, 2011 treatment note in which Plaintiff presented with
2 bandages on the fingers of both hands and one hand had a swollen and discolored
3 small finger related to a recent fall, Tr. 504; (2) A March 30, 2011 treatment note
4 describing Plaintiff as having more arthritic changes in her hands, Tr. 507; and (3)
5 A November 19, 2014 report showing Plaintiff had arthritis affecting both her
6 hands and the examination showed moderate swelling of the joints of both hands,
7 Tr. 376.

8 The ALJ appears to overlook a potentially alarming rheumatological trifecta
9 concerning Plaintiff: (1) she had a history of inflammation severe enough to be
10 treated with prednisone, Tr. 454 (a May 2, 2007 note in which she reported she had
11 been diagnosed with “chronic inflammation” and had taken prednisone as
12 treatment); (2) she was suffering from degenerative osteoarthritis in at least one of
13 her peripheral joints prior to the date last insured, Tr. 262 (osteoarthritis in the left
14 foot); and (3) she was precluded from taking anti-inflammatory medication, Tr.
15 448-49 (Plaintiff donated a kidney to her son in 2007 and was instructed to avoid
16 long term use of anti-inflammatory medication). This coupled with Plaintiff’s
17 allegations of arthritis symptoms in her hands prior to her date last insured, Tr. 53,
18 should have triggered the ALJ’s duty to develop the record and work on gathering
19 the missing treatment notes from her primary care physicians, a podiatrist, and a
20 rheumatologist from 2006 through 2013.

21 “In Social Security cases the ALJ has a special duty to fully and fairly
22 develop the record and to assure that the claimant’s interests are considered.”
23 *Smolen*, 80 F.3d at 1288. Despite the ALJ’s duty to develop the record, it remains
24 the claimant’s burden to prove that she is disabled. 42 U.S.C. § 423(d)(5)(A); 20
25 C.F.R. § 404.1512(a). “An ALJ’s duty to develop the record . . . is triggered only
26 when there is ambiguous evidence or when the record is inadequate to allow for
27 proper evaluation of the evidence.” *Mayes v. Massanari*, 276 F.3d 453, 459-60
28 (9th Cir. 2001); *Webb*, 433 F.3d at 687 (“The ALJ’s duty to supplement a

1 claimant's record is triggered by ambiguous evidence, the ALJ's own finding that
2 the record is inadequate[,] or the ALJ's reliance on an expert's conclusion that the
3 evidence is ambiguous.''). An ALJ may fulfill her duty to develop the record by
4 continuing the hearing, or keeping the record open after the hearing to allow
5 supplementation of the records. *Smolen*, 80 F.3d at 1288.

6 Here, the record is ambiguous as to the existence of arthritis in Plaintiff's
7 hands prior to the date last insured. As discussed above, there is evidence of a
8 history of inflammation prior to the date last insured and complaints involving her
9 hands shortly after the date last insured. Even the first diagnosis of hand arthritis
10 in the record, dated November of 2014, actually refers to a previous diagnosis:
11 "She has been diagnosed with OA affecting the hands." Tr. 376. Additionally, the
12 ALJ was aware of the outstanding evidence as it was referred in the materials
13 Plaintiff provided upon application and referenced in the medical evidence. Thus,
14 the ALJ's duty to develop the record was triggered. There is an argument that the
15 ALJ fulfilled her duty by continuing the July 7, 2015 hearing to allow for
16 additional evidence to be gathered. *See* Tr. 41. However, without the transcript of
17 the July 7, 2015 hearing, this Court cannot make such a determination.

18 Defendant argues that the ALJ's step two determination was legally
19 sufficient as she relied on the statements of Dr. Schosheim. ECF No. 17 at 7-8. In
20 her step two analysis, the ALJ stated "[c]onsistent with the opinion of Dr.
21 Schosheim, the undersigned finds. . . hand arthritis [was] not [a] medically
22 determinable impairments on or before the date the claimant's insured status
23 expired." Tr. 24. However, a review of Dr. Schosheim's testimony shows a very
24 limited consideration of the record. Upon cross examination, he clearly indicated
25 that he was only considering evidence of Plaintiff's impairments from September
26 1, 2010 to September 30, 2010. Tr. 48-50. When Plaintiff's counsel inquired
27 about evidence prior to September 1, 2010 he rejected it because it was before the
28 onset date. Tr. 49-50. When asked about evidence in the months following

1 September 30, 2010, he rejected it because it was after the date last insured. Tr.
2 49. The ALJ's reliance on the opinion which only took into account a month of
3 evidence is in sharp contrast with the Ninth Circuit's approach to the treatment of
4 evidence in establishing the existence of an impairment prior to the date last
5 insured, which has consistently been that "reports containing observations made
6 after the period for disability are relevant to assess the claimant's disability."
7 *Smith v. Bowen*, 849 F.2d 1222, 1225 (9th Cir. 1988); *see also Sampson v. Chater*,
8 103 F.3d 918, 922 (9th Cir. 1996); *Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217,
9 1228-29 (9th Cir. 2010); *Tobeler v. Colvin*, 749 F.3d 830, 833 (9th Cir. 2014).

10 In conclusion, the ALJ's step two determination finding there was no
11 evidence that Plaintiff's bilateral hand arthritis was present prior to the date last
12 insured cannot stand in the face of the absent medical evidence and the incomplete
13 record before the Court. Therefore, the case is remanded for the ALJ to properly
14 and fully develop the record by gathering evidence from the locations listed above
15 and supplementing the administrative record with the transcript from the July 7,
16 2015 hearing and any evidence establishing that the January 2016 hearing was
17 either held or continued.

18 **2. Opinion Evidence**

19 Plaintiff argues the ALJ failed to properly consider and weigh the opinions
20 expressed by Plaintiff's treating rheumatologist, Sean LaSalle, M.D., and treating
21 mental health counselor, Carole Siefken, ARNP. ECF No. 13 at 13-18.

22 For all cases filed prior to March 27, 2017, acceptable medical sources
23 included providers who had attained a M.D., but not nurse practitioners. 20 C.F.R.
24 § 404.1502(a). In weighing opinions from acceptable medical sources, the ALJ
25 should distinguish between three different types of physicians: (1) treating
26 physicians, who actually treat the claimant; (2) examining physicians, who
27 examine but do not treat the claimant; and, (3) nonexamining physicians who
28 neither treat nor examine the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.

1 1995). The ALJ should give more weight to the opinion of a treating physician
2 than to the opinion of an examining physician. *Orn v. Astrue*, 495 F.3d 625, 631
3 (9th Cir. 2007). Likewise, the ALJ should give more weight to the opinion of an
4 examining physician than to the opinion of a nonexamining physician. *Id.*

5 When a treating physician's opinion is not contradicted by another
6 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.
7 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
8 physician's opinion is contradicted by another physician, the ALJ is only required
9 to provide "specific and legitimate reasons" for rejecting the opinion. *Murray v.*
10 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). The specific and legitimate standard
11 can be met by the ALJ setting out a detailed and thorough summary of the facts
12 and conflicting clinical evidence, stating her interpretation thereof, and making
13 findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is
14 required to do more than offer her conclusions, she "must set forth [her]
15 interpretations and explain why they, rather than the doctors', are correct."
16 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

17 In contrast, an ALJ is only required to give "germane" reasons to discount
18 evidence from "other sources," including the opinions of a nurse practitioner.
19 *Dodrill v. Shalala*, 12 F.3d 915 (9th Cir. 1993); *Molina v. Astrue*, 674 F.3d 1104,
20 1111 (9th Cir. 2012).

21 **A. Sean LaSalle, M.D.**

22 Dr. La Salle, a rheumatologist, began treating Plaintiff in January of 2015.
23 Tr. 304. On April 3, 2015, he completed a Medical Report form opining, among
24 other limitations, that Plaintiff's bilateral hand arthritis had not only been present,
25 but had precluded her from handling bilaterally since January of 2010, "per patient
26 report." Tr. 304-05. The ALJ gave "no weight" to this opinion because (1)
27 "records in evidence do not establish that the claimant had osteoarthritis on or
28 before the date her insured status expired," (2) his diagnoses included

1 fibromyalgia, which was not a medically determinable impairment on or before
2 Plaintiff's date last insured, and (3) the opinion was based on Plaintiff's self-
3 reports. Tr. 30.

4 Once again, the Court has difficulty addressing the ALJ's reasons with
5 potentially such a large number of records being absent. Due to the ALJ's failure
6 to develop the record, the rejection of Dr. LaSalle's opinion cannot be upheld.
7 Once the missing medical evidence has been associated with the record, the ALJ
8 will readdress Dr. LaSalle's opinion.

9 **B. Carole Siefken, ARNP**

10 Nurse Siefken completed mental residual functional capacity forms on
11 March 20, 2014, Tr. 292-94, and February 10, 2015, Tr. 298-301. The ALJ
12 assigned both opinions "little weight" because (1) Nurse Siefken did not provide
13 any rationale or cite any evidence to support her opinions, (2) the opinions were
14 based on the Plaintiff's medical issues, but there was no evidence Nurse Siefken
15 completed any physical examinations, and (3) Nurse Siefken provided the opinions
16 as to Plaintiff's current functioning and the Plaintiff was required to establish
17 disability on or before September 30, 2010. Tr. 30-31.

18 The ALJ is accurate that these opinions only address Plaintiff's functional
19 abilities as of 2014 and 2015. Considering the ALJ was only held to the lower
20 standard of "germane reasons," the ALJ did not error in her treatment of Nurse
21 Siefken's opinions. That being said, the ALJ's assessment of the opinions may
22 change with additional evidence being added to the record. Therefore, the ALJ
23 will address all functional opinions upon remand after the supplementing the
24 record with the missing evidence.

25 **2. Plaintiff's Symptom Statements**

26 Plaintiff contests the ALJ's determination that Plaintiff's symptom
27 statements were not supported by the medical evidence and other evidence in the
28 record. ECF No. 13 at 18-21.

1 It is generally the province of the ALJ to make credibility determinations,
2 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific
3 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
4 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
5 testimony must be "specific, clear and convincing." *Smolen*, 80 F.3d at 1281;
6 *Lester*, 81 F.3d at 834. "General findings are insufficient: rather the ALJ must
7 identify what testimony is not credible and what evidence undermines the
8 claimant's complaints." *Lester*, 81 F.3d at 834.

9 In making her determination, the ALJ summarized Plaintiff's testimony at
10 the first hearing and the second hearing in separate paragraphs. Tr. 26-27. The
11 ALJ then found that Plaintiff's medically determinable impairments could be
12 expected to cause her alleged symptoms, but that her "statements concerning the
13 intensity, persistence and limiting effects of these symptoms are not entirely
14 consistent with the medical evidence and other evidence in the record." Tr. 27.
15 The ALJ reasoned that Plaintiff's symptom statements were unreliable because (1)
16 they were not supported by the medical evidence, (2) she failed to follow
17 prescribed treatment, and (3) she did not seek out mental health treatment. Tr. 27-
18 29.

19 Considering the transcript from the first hearing is not in the record, it is
20 difficult for the Court to assess whether or not the ALJ's reasons for rejecting
21 Plaintiff's testimony at that hearing meet the necessary standard. Upon remand,
22 the ALJ will supplement the record with the transcript from the July 7, 2015
23 hearing.

24 As for the ALJ's reasons for rejecting the testimony from the May 4, 2016
25 hearing, the ALJ failed to meet the necessary specific, clear and convincing
26 standard. First, the ALJ found that Plaintiff's symptom statements were not
27 supported by the medical evidence. Tr. 27-28. An ALJ may cite inconsistencies
28 between a claimant's testimony and the objective medical evidence in discounting

1 the claimant's testimony. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219,
2 1227 (9th Cir. 2009). Here, the ALJ summarized the hearing testimony, asserted it
3 was not supported by the medical evidence, and then summarized the medical
4 evidence. *Id.* In doing so, the ALJ failed to state which specific medical records
5 undermined which specific allegation by Plaintiff. *See Lester*, 81 F.3d at 834
6 ("General findings are insufficient; rather, the ALJ must identify what testimony is
7 not credible and what evidence undermines the claimant's complaints."). In only
8 one of the findings did the ALJ connect Plaintiff's testimony to the medical
9 evidence demonstrating inconsistency. The ALJ found that "[w]hile the claimant
10 testified that she did not recall breaking her cast by walking on it, the medical
11 records show she was casted three separate times in February 2010 because she
12 broke the cast walking on it, which was against medical advice (1F14-16)." Tr. 27.
13 This reason meets the specificity requirement addressed in *Lester*, but because the
14 ALJ failed to provide other legally sufficient reasons for rejecting Plaintiff's
15 symptom statements, this reason alone cannot support her determination. *See*
16 *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (Objective medical
17 evidence is a "relevant factor in determining the severity of the claimant's pain and
18 its disabling effects," but it cannot serve as the sole reason for rejecting a
19 claimant's credibility.).

20 The ALJ's second reason for rejecting Plaintiff's testimony was merely a
21 reference to Plaintiff's failure to continue her physical therapy and not a specific
22 finding. *See* Tr. 28. The ALJ's inference consisted of just two sentences. The
23 first stated that Rodney Graves, DPM "gave the claimant a walking boot and a
24 physical therapy referral." Tr. 27-28. Then the ALJ stated that Plaintiff "only
25 went to physical therapy for an initial evaluation." Tr. 28. Nowhere did the ALJ
26 actually find that a failure to complete physical therapy underscored Plaintiff's
27 symptoms. Therefore, this inference lacks the specificity required of specific, clear
28 and convincing. *See Garrison v. Colvin*, 759 F.3d 1014, 1021 (9th Cir. 2014)

1 (*quoting Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)
2 (“The clear and convincing standard is the most demanding required in Social
3 Security cases.”)).

4 The final reason provided by the ALJ for rejecting Plaintiff’s statements,
5 that she only sought mental health treatment three times in 2010, fails to meet the
6 specific, clear and convincing standard. Noncompliance with medical care or
7 unexplained or inadequately explained reasons for failing to seek medical
8 treatment casts doubt on a claimant’s subjective complaints. 20 C.F.R. §
9 404.1530; *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). Here, the ALJ found
10 that Plaintiff’s testimony that she had missed work due to her depression, was
11 inconsistent with only three counseling sessions she attended in 2010. Tr. 29. In
12 coming to this conclusion, the ALJ failed to consider Plaintiff’s ability to afford
13 treatment at this time. *See Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir. 1995). At
14 the May 4, 2016 hearing, Plaintiff testified that while she had insurance during this
15 time, she still had limited funds to seek treatment. Tr. 57. Additionally, the record
16 contains a January 18, 2011 counseling session in which Plaintiff presented with
17 injuries to her hands and stated that her spouse refused to allow her to seek
18 treatment due to the cost. Tr. 504. The Ninth Circuit has held that “it is a
19 questionable practice to chastise one with a mental impairment for the exercise of
20 poor judgment in seeking rehabilitation.” *Nguyen v. Chater*, 100 F.3d 1462, 1465
21 (9th Cir. 1996) (*quoting Blankenship v. Bowen*, 874 F.2d 1116, 1124 (9th Cir.
22 1989)). As such, the ALJ’s rejection of Plaintiff’s testimony due to lack of
23 counseling is not legally sufficient.

24 The ALJ failed to provide legally sufficient reasons for rejecting Plaintiff’s
25 statements from the May 4, 2016 hearing. Therefore, upon remand the ALJ will
26 readdress Plaintiff’s symptom statements in full.

27 **REMEDY**

28 The decision whether to remand for further proceedings or reverse and

1 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
2 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
3 where “no useful purpose would be served by further administrative proceedings,
4 or where the record has been thoroughly developed,” *Varney v. Secretary of Health*
5 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
6 by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280
7 (9th Cir. 1990); *see also Garrison*, 759 F.3d at 1021 (noting that a district court
8 may abuse its discretion not to remand for benefits when all of these conditions are
9 met). This policy is based on the “need to expedite disability claims.” *Varney*,
10 859 F.2d at 1401. But where there are outstanding issues that must be resolved
11 before a determination can be made, and it is not clear from the record that the ALJ
12 would be required to find a claimant disabled if all the evidence were properly
13 evaluated, remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96
14 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

15 In this case, it is not clear from the record that the ALJ would be required to
16 find Plaintiff disabled if all the evidence were properly evaluated. Further
17 proceedings are necessary for the ALJ to supplement the record with the
18 outstanding medical evidence referenced above and the transcript from the July 7,
19 2015 hearing. Additionally, the ALJ will readdress the opinion evidence in the file
20 and the reliability of Plaintiff’s symptom statements. The ALJ will call a medical
21 expert and a vocational expert to testify at a remand hearing and make a new
22 determination addressing steps one through five.

23 CONCLUSION

24 Accordingly, **IT IS ORDERED:**

- 25 1. Defendant’s Motion for Summary Judgment, **ECF No. 17**, is
26 **DENIED**.
- 27 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 13**, **GRANTED**,
28 **in part**, and the matter is **REMANDED** to the Commissioner for additional

1 proceedings consistent with this Order.

2 3. Application for attorney fees may be filed by separate motion.

3 The District Court Executive is directed to file this Order and provide a copy
4 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
5 and the file shall be **CLOSED**.

6 DATED September 5, 2018.



A handwritten signature in black ink, consisting of a stylized 'M' followed by a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE